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IN THE

# Supreme Court of the United States of America

Senel Taylor, Johnnietta McGrady, Christine Suma, Arkele Winston, and Amy Hudock

&

Susan Tave Zelman, Superintendent of Public Instruction of Ohio,

*Petitioners,*

*v.*

Doris Simmons-Harris, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Independent Schools ("NAIS") is a voluntary membership organization that represents over 1,100 independent pre-collegiate schools nationwide. NAIS believes that educational choice for students and their families is of paramount importance. To further this goal, NAIS promotes high standards of academic excellence for independent schools as well as encourages increased affordable access to private schools and diversification of independent school communities.

The pre-collegiate education system in the United States is a mosaic of public, religious, independent, and other private schools, all working together to provide the best possible education for American children. A system that relies on the richness of pluralism and diversity must make its resources accessible to all children. A basic belief of private education is that families should have options in the pursuit of their children's education. Such choices always have existed for families that have the means to pay private school tuition costs, and should be available to all. Government funded educational choice initiatives play an important part in this ideal.

Private schools have long been committed to extending equity and access for children in the United States. These schools have developed strong financial aid programs and

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[1] Counsel for NAIS authored this brief in its entirety. No counsel for a party authored this brief in whole or in part and no person, other than NAIS, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief is being submitted with the written consent of all parties pursuant to Rule 37.2. Letters of consent from all parties' counsel are being filed simultaneously with the Clerk of the Court.

recruitment practices that encourage broad and diverse student populations. Over the past several decades, independent schools have seen steady increases in enrollment of students from varying social, economic, racial, and ethnic backgrounds. This increased access to private schools has shown that these schools provide learning environments and activities that are attractive to families from diverse circumstances.

NAIS considers choice fundamental to the issue of equity and access in education. This choice should be entirely left to students and their parents irrespective of the sectarian nature of an individual's school of choice. NAIS does not advocate any particular brand of public school choice plan or legislation. Rather, NAIS generally supports policy initiatives that increase educational opportunities for children who do not have educational choices available to them. NAIS strongly believes that a decision for the respondents in this matter would stymie efforts to improve educational opportunities for children throughout the United States.

## ARGUMENT

This case presents the question of whether scholarships or other tuition aid provided to students for enrollment in the school of their choice regardless of religious affiliation violates the Establishment Clause, U.S. Const. Amend. I. Using the test first enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court of appeals found that the Ohio Pilot Project Scholarship Program had the "impermissible effect" of promoting religion in violation of the Establishment Clause of the First Amendment, despite the Program's neutral purpose and provision of direct funding to students. *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000), *cert. granted*, 150 L. Ed. 2d 805 (2001). *See Lemon*, 403 U.S. at 612-13

(identifying three elements to be considered in assessing Establishment Clause violations: (1) secular purpose, (2) primary effect to neither advance nor inhibit religion, and (3) no excessive entanglement between government and religion); *Agostini v. Felton*, 521 U.S. 203 (1997) (modifying second element to include consideration of government entanglement). The court of appeals determined that the government impermissibly limited the choices of the qualified applicants to sectarian schools, thereby creating a primary effect of advancement of religion. *See Simmons-Harris*, 234 F.3d at 960.

NAIS submits this brief to address two aspects of the Sixth Circuit's opinion that contravene Establishment Clause precedent. First, a government program such as the Ohio Pilot Project Scholarship Program does not run awry of the Establishment Clause when the decision to use government-disbursed funds at sectarian schools is made by the program participants themselves. Providing state funds directly to individual students to use at their choice, rather than giving the funds directly to sectarian institutions without student intervention, insulates the government from an inference of support or sponsorship of religion. Second, receipt of government initiated funds at sectarian schools is allowable where the funds do not relieve the schools of costs otherwise borne by the schools, but rather merely pay for the specific services needed by the student beneficiary.

This Court has consistently upheld government programs that provide educational services or funds to individuals irrespective of the sectarian nature of the institutions they choose to attend. *See Agostini*, 521 U.S. at 234 (upholding public school teachers providing remedial services to needy students in religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 US 1, 9 (1993) (allowing publicly funded

interpreter for deaf student attending Roman Catholic high school); *Witters v. Washington Dep't of Servs. for the Blind,* 474 U.S. 481, 489 (1986) (upholding postsecondary grant for blind student who chose to attend divinity school using grant money); *Mueller v. Allen,* 463 U.S. 388, 403-04 (1983) (sustaining tax deductions for educational expenses incurred at public, private, and religious schools). School "vouchers" or tuition aid provided directly to students for use at the school of their choice should be no different.

## I. INDIVIDUAL CHOICE EFFECTING RECEIPT OF STATE FUNDS DOES NOT CONSTITUTE STATE APPROVAL FOR RELIGION

When funds reach religious institutions only indirectly through the private and independent decisions of individuals, such programs do not run afoul of the Establishment Clause. Independent choices by students and their parents ensure that a sectarian school's ultimate receipt of these funds in no way connotes State selection or approval of the sectarian school or its causes. *See Mueller*, 463 U.S. at 399; *Zobrest* 509 U.S. at 10; *see also Rosenberger v. Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819, 848 (1995) (O'Connor, J., concurring); *accord Mitchell v. Helms*, 530 U.S. 793, 843 (2000) (O'Connor, J.); *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part). This Court has repeatedly enforced the principle that such direct aid to individuals who freely choose to use this money for services offered by sectarian entities is constitutional. The Ohio Program provides students and their families with such choices.

In *Witters*, the Court upheld a student's use of a government tuition grant to study theology at a sectarian school. The grant money was paid directly to the student, who in turn exercised his personal choice to spend the money

pursuing a religious profession. The Court reasoned that since the tuition grant money "ultimately flowed" to sectarian institutions "only as a result of the genuinely independent and private choices" of eligible student recipients, the tuition grant was not an impermissible "direct subsidy." *See Witters*, 474 U.S. at 487-88 (*citation omitted)*.

Here, as in *Witters*, the tuition grants were "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature'" of the institutions that might benefit as a result of individual recipients' choices. *Id.* at 487 (*quoting Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-83 n.38 (1973)). Funding programs, such as the instant school voucher program, that utilize neutral eligibility criteria and provide for individual choice ensure that sectarian schools' participation in the program "'[could] not be attributed to state decisionmaking,'" but rather only to the individual recipient of funds. *See Zobrest*, 509 at 10 (*quoted in Agostini*, 521 U.S. at 226). As in these earlier cases, the Ohio Program provides opportunities for educational choices to qualified individuals. Individuals participating in the Program are free to exercise that choice in favor of public or private, and sectarian and nonsectarian schools.

In the face of this jurisprudence, the Sixth Circuit inexplicably found it "inappropriate" to consider parental choice as a determinative factor where there is "government limitation of the available choices to overwhelmingly sectarian private schools." *Simmons-Harris v. Zelman*, 234 F.3d at 960. The court of appeals' argument goes awry in its reliance on the number of participating sectarian schools to reach the conclusion that the relative percentages of nonsectarian to sectarian private schools must prove that the State improperly limited individual choice so

overwhelmingly that it impermissibly promoted religion through the Ohio Program.[2] The court of appeals failed to acknowledge both the neutrality and availability of the program to other nonsectarian private schools as well as the non-private school options available to participants.

This Court has specifically rejected the worth of resultant percentages as determinative of Establishment Clause violations. *See Mueller*, 463 U.S. at 401; *see also Agostini*, 521 U.S. at 210, 229 (upholding use of public school remedial teachers in private schools even though 90% of the schools within area in question were sectarian). As a matter of law, the court of appeals erred in basing its ultimate conclusion on such percentages. Further, in relying so heavily on these percentages, the court of appeals creates precedent that affects educational choice initiatives around the country, as well as many other federal and state programs.

This precedent requires legislatures to second guess the participation of schools and the resultant choices of parents, unconstitutionally inhibit the participation of sectarian schools, or severely limit the educational aid options. This end would result in largely tax-based initiatives for educational choice, initiatives that rarely aid those who need such educational choice the most, those whose income is below the poverty line plus 200%, the very focus of the Ohio Program.

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[2] Interestingly, with 82% sectarian schools, the relative percentages of registered private schools in Cleveland School District are remarkably reflective of the nationwide sectarian-nonsectarian state of private schooling in the country. Nationally, sectarian schools represent fully 78.4% of all private schools. Private School Universe Study 1999-2000, U.S. Department of Education, National Center for Education Statistics (Nov. 8, 2001, available at http://nces.ed.gov/pubs2001/2001330.pdf).

Beyond its reliance on resultant statistics, the court of appeals' use of the statistics themselves is misleading because the court fails to acknowledge that by meeting very basic, nonreligious, statutory requirements, *all* private schools within a covered school district are eligible to participate in the Program, regardless of religious affiliation. These relative percentage numbers are irrelevant to the issue of promotion of religion in such a neutral program. There is no basis for sole, or even primary, reliance on school participation figures to prove promotion of religion, so long as the program has a neutral purpose that is based on individual choice. *See Simmons-Harris v. Zelman*, 234 F.3d at 972-73 (Ryan, J., concurring in part and dissenting in part); *accord Zobrest* 509 U.S. 1; *Rosenberger,* 515 U.S. 819; *Mitchell,* 530 U.S. 793; *Witters*, 474 U.S. 481. In other words, the Ohio Program provides the maximum opportunity for participation by all of the private schools in the relevant district.

Even if sectarian school participation figures are taken into account, these figures must be considered in light of the Ohio Program as a whole. Consideration of all of these options is what makes this instant case the resolving point of the tension between this Court's recent precedent and *Nyquist*. The tension results from the question this Court reserved in that case: whether scholarships or other aid made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions violates the Establishment Clause. *Nyquist,* 413 U.S. at 782 n.38.

The Ohio Program offers a multitude of options to eligible students, including opportunities to attend a sectarian or nonsectarian private school in the district, a participating public school located in an adjacent district, a community or magnet school, or their current public school with additional,

voucher-obtained tutoring. *See* Ohio Rev. Code § 3313.976; *Simmons-Harris v. Zelman*, 234 F.3d at 968 (Ryan, J., concurring in part and dissenting in part). None of the schools or programs receives any extra funding or payments until the student and his family makes the decision to attend.

Unlike *Nyquist*, however, this program allows public schools to be a very real part of this choice, and receive scholarship payments as well. Students and parents in the Cleveland district were provided with more choices than are available in almost any other area in the country. Rather than proving that the State has limited educational choices to predominantly sectarian schools, the Program illustrates how the State of Ohio has expanded the host of typically available educational options.

## II. RECEIPT OF THESE FUNDS WOULD NOT RELIEVE SECTARIAN SCHOOLS OF COSTS OTHERWISE BORNE BY THE SCHOOLS

Noticeably absent from the court of appeals' analysis is any consideration of the direct affect of receipt of the funds by the participating schools. In both *Agostini* and *Zobrest*, this Court found that whether a program impermissibly finances religious indoctrination rests partially on whether the funding "reliev[es] sectarian schools of costs [they] otherwise would have borne in educating [their] students." *Agostini*, 521 U.S. at 226 (*quoting Zobrest*, 509 U.S. at 12). As in these cases, the Ohio Program does not relieve the participating sectarian schools of costs they are otherwise obligated to bear as operational consequence.

In the instant case, as in cases this Court has previously considered, sectarian schools are incidental beneficiaries of students' educational choice. The funding does not provide

the sectarian schools financial relief in violation of the Establishment Clause. In *Agostini* this Court found that provision of a public school teacher to teach remedial classes in sectarian schools did not relieve the sectarian schools of educational costs they would have otherwise absorbed.

Similarly, in *Zobrest*, this Court found that providing an interpreter for a deaf student who wished to attend a sectarian high school would also not relieve the school of any costs for which it would otherwise have paid. In both cases, this Court came to the conclusion that the benefit truly ran to the student and his family and as a result of the educational choice. *See Agostini*, 521 U.S. at 226; *Zobrest* 509 U.S. at 12-13. Any benefit received by the school was incidental to the individual choice and not a result of a government decision. *See id.* The chief benefit of the interpreter or the remedial teacher was for the student directly. Any minor benefit to the school was incidental to the student's choice.

By comparison, in *Nyquist* this Court found that New York State funds given directly to sectarian schools for facility maintenance violated the Establishment Clause. *Nyquist*, 413 U.S. at 796-97. These are clearly costs that schools normally have to bear to continue educating students, and the school has an obligation to ensure that this maintenance occurs regardless of which students attend. Unlike facility maintenance, the *Agostini* and *Zobrest* schools did not have a need for the interpreter or remedial teacher unless the direct beneficiaries, the eligible students, were at the schools.

As with the Title I and the IDEA benefits at issue in *Agostini* and *Zobrest*, the Ohio Program only provides aid to eligible students, through whichever school option they choose. In the sectarian schools, no other students or the

religion itself benefit from the voucher payment. In all three cases, the benefit is based on the qualifying criteria of the student himself, and is for his sole benefit to be used at his discretion. If the student is not at the school, the interpreter, the remedial class, or the tuition payment for the extra student need not occur, as there is no need or benefit. In this way, none of the programs provide impermissible financial relief to the participating sectarian schools. Schools receive only the incidental benefit of having another student. The student receives the primary benefit to meet his needs.

The vouchers are used directly for tuition, paid and applied like the tuition of any other student attending the school. The State is not relieving the school of any financial burden it would otherwise bear in its day to day operations; to the contrary, the State fails to pay the entire tuition amount. In many cases this may result in schools, sectarian or otherwise, using other funding to meet the remainder of the student's tuition.

## CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be *reversed.*

Respectfully submitted,

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